PATEL HOLDINGS SDN. BHD.

v.

ESTET PEKEBUN KECIL SDN. BHD. & ANOR.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 22-36-88]
15 OCTOBER 1991

CIVIL PROCEDURE: *Setting aside - Judgment in default of defence of counter-claim - Appeal - Whether merits shown - Two earlier judgments on consent order which is the subject matter of suit - Whether would amount to relitigating matter if appeal allowed.*

This was an appeal by the plaintiff, P, to set aside a judgment in default of defence to counter-claim. The suit arose from a consent order made in respect of an earlier suit. In this suit plaintiff prayed *inter alia* for a declaration the plaintiff is relieved from its obligations under the consent order. Earlier, 2 other judgments had been given in respect of the same consent order. An injunction obtained by the plaintiff with regard to the consent order on the ground that the 1st defendant, D1, had committed fraud in respect of the consent order was set aside as it was held there were no triable issues on these grounds. The other judgment was pertaining to D1's application to strike out the plaintiff's statement of claim in the present action whereby the plaintiff's claim that the consent order be rescinded and set aside on grounds of fraudulent misrepresentation by D1 was struck out.

D1 filed their defence and counter-claim but P did not file a defence to the counter-claim and D1 obtained judgment in default of defence to the counter-claim. Plaintiff then filed an application for leave to reply to the defence and to enter defence to D1's counter-claim out of time and to set aside the judgment in default. P's application to set aside the judgment in default was not allowed and P appealed.

Held:

[1] As the judgment was regularly obtained the plaintiff had to show there were merits in their case.

[2] Since the two earlier judgments had been given on the same consent order determining that there were no triable issues with respect to the plaintiff's allegation that the 1st defendant had committed fraud in respect of the Court order and the plaintiff's claim that the consent order be rescinded and set-aside was struck out, plaintiff should not be allowed to relitigate the matter. Therefore the judgment in default with respect to the same prayers on which the issues were determined be allowed to stand.

[3] With regard to the other claims by the 1st defendant in their counter-claim, plaintiff had shown that there were triable issues and merits in their case. As such application to set aside on those claims are allowed and the plaintiff was ordered to file defence with regard thereto.

[Plaintiff's application to set aside certain claims allowed. Plaintiff to file defence.]

Cases referred to:

Fira Dvpt. Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 CLJ (Rep) 32 ***(cit)***
Government of Malaysia v. Datuk Chong Kok Lim [1973] 2 MLJ 74 ***(cit)***
Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor. [1988] 1 CLJ (Rep) 190 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - N. Shanmugam; M/s. V.M. Mohan & Co.
For the 1st defendant - S. Kanawagi; M/s. Khana & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

The plaintiffs commenced this suit on 26 March 1988. The first defendants filed their defence and counter-claim on 9 November 1988. The plaintiffs did not file any defence to the counter-claim. On 1 February 1989 the first defendants obtained a judgment in default of defence to counter-claim. On 26 June 1989 the plaintiffs filed this application (Enclosure 51) for leave to file a reply to the defence and defence to the first defendants' counter-claim out of time and to set aside the judgment in default. Parties chose to submit written submission which they did. In my order dated 19 September 1991, I allowed part of the judgment to be set aside and refused part of it. The plaintiffs appealed against that part of my order refusing the judgment in default to be set aside.

The suit actually arose from a consent order made on 21 January 1988 in respect of an earlier Suit (22-145-87) in which the plaintiffs therein were the same as the plaintiffs in this suit and the second defendants therein were the same as the first defendants in this suit.

In this suit the plaintiffs prayed for:

(a) a declaration that the plaintiff is relieved from performing any of its obligations under the consent order dated 21 January 1988;

(b) a declaration that the 1st defendant is not entitled to enforce the guarantees Nos 87/0425 and 87/0426 both dated 23 July 1987 and issued by the 2nd defendant in the 1st defendant's favour;

(c) rescission of the agreement embodied in the said consent order;

(d) an order that the said consent order be set aside;

(e) an injunction perpetually restraining the 1st defendant from enforcing or attempting to enforce the said bank guarantees or from receiving payment from the 2nd defendant upon the said bank guarantees;

(f) a declaration that the 2nd defendant is not entitled to make payment of the sum of RM500,000 or any sum whatsoever to the 1st defendant upon the said bank guarantees;

(g) an injunction perpetually restraining the 2nd defendant from making payment to the 1st defendant under the said bank guarantees;

(h) general damages for fraud;

(i) interest on damages;

(j) costs;

(k) further or other relief.

It should also be mentioned that on 26 March 1988 (the day this action was filed) the plaintiffs obtained an injunction against the first defendants preventing the first defendants from up lifting the performance bank guarantee given by the second defendant. This *ex-parte* injunction was set aside by my brother Wan Adnan J on 4 October 1988. The plaintiffs appealed to the Supreme Court. It was dismissed with costs. The judgment of Wan Adnan J is reported in [1989] 1 MLJ 190.

Meanwhile, on 24 November 1988 the first defendants applied that the plaintiffs' statement of claim in this suit be struck out under O. 18 r. 19 of the Rules of the High Court 1980. I allowed the application on 8 January 1991. The plaintiffs did not appeal against my said order.

Many grounds were raised by Counsel for the first defendants in resisting this application. They were that the solicitors of the plaintiffs had no authority to file this application (summons-in-chambers - encl. 51), that the Court had no power to set aside its own order (default judgment), delay in making this application, that the plaintiffs did not explain why default judgment was allowed, that the plaintiffs should be frank, candid and honest in making the application and that the judgment was spent and therefore there was nothing to set aside. As I did not find in favour of the first defendants on these grounds and this appeal is by the plaintiffs, it is not necessary for me to discuss all those grounds.

It should be noted that, that part of the default judgment which I did allow to be set aside were in respect of:

(a) the sum of RM488,123.75 (Prayer A)

(b) the sum of RM2,317 (Prayer B)

(c) the sum of RM94,069.43 (Prayer C)

The application was argued on the basis that the judgment was regularly obtained. Therefore the plaintiffs would have to show that there were merits in their case: *Fira Dvpt. Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 CLJ (Rep) 32.

I am of the view that there are no merits in the plaintiff's case in respect of these amounts.

As regards the amount of RM488,123.75, it should be noted that as embodied in the consent order, at the time when the consent order was entered, there was a balance due from the plaintiffs in the sum of RM585,748.50 - see para 1(c)(i) of the consent order. On 15 February 1988 the plaintiffs paid the first instalment of RM97,624.75, thus leaving a balance of RM488,123.75 - see under the heading "A - claim in debt on existing liability" at p. 12-13 of the counter-claim.

The sum of RM2,317 was the price of 16.02 MT crude palm oil (CPO) delivered to the plaintiffs in addition to 2,500 MT delivered pursuant to the consent order - for a clearer picture please see under the heading "B - Claim for price of CPO taken and not paid" at p. 12 of the counter-claim.

The sum of RM94,069.43 was the loss suffered by the first defendants as a result of the plaintiffs' failure to take delivery of the whole of 7,000 MT as embodied in the consent order - see para 2(b) of the consent order. The plaintiffs only took delivery of 2,516.07 MT - see under heading "C - Claim for CPO not taken and sold below agreed price" at p. 13 of the counter-claim.

In short I did not allow the plaintiffs' application to set aside the judgment in default in respect of the amount stated in the consent order to be due to the first defendants from the plaintiffs (less payment made subsequent to the consent order) that is, the sum of RM488,123.75. The amount of RM2,317 was the price of CPO actually delivered pursuant to the consent order but not paid for. And, the amount of RM94,069.43 was the loss incurred by the first defendants because they had to sell at a price lower than that agreed by the plaintiffs the balance of CPO not taken delivery of by the plaintiffs even though the plaintiffs, as embodied in the consent order agreed to take delivery at the agreed price.

In other words, I am of the view that the plaintiffs are bound by the consent order. So the plaintiffs are estopped from disputing the amount stipulated in the consent order to be due from them to the first defendants, the amount not paid by the plaintiffs for CPO delivered pursuant to the consent order and the loss directly suffered by the first defendants for having to sell at a lower price the CPO not taken by the plaintiffs pursuant to the consent order.

Two judgments of this Court had been given on the same consent order. First, my brother Wan Adnan J, in setting aside the injunction had occasion to deal with it. The plaintiff had alleged that the first defendants had committed fraud in respect of the consent order. My brother Wan Adnan J held that there was no triable issues and set aside the injunction. This was confirmed by the Supreme Court.

I too had occasion to consider the same consent order when I heard the first defendant's application to strike out the statement of claim in this same action. It was my judgment that the consent order was valid and that the plaintiff's claim, *inter alia*, that the consent order be rescinded and set aside on grounds of fraudulent misrepresentation by the first defendant, be struck out under O. 18 r. 19 of the Rules of the High Court 1980. There was no appeal by the plaintiffs against that judgment of mine.

That being the case, the plaintiffs should not be permitted to re-litigate the very same issue in this very same case - see *Government of Malaysia v. Datuk Chong Kok Lim* [1973] 2 MLJ 74; *Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor.* [1988] 1 CLJ (Rep) 190 SC.

As regards the other claims by the first defendants in their counter-claim, *viz.* "Claim for breach of contract", "claim for damages for tort of abuse of Court process", "claim on wilful interference in a subsisting contract", I was of the view that there were triable issues and therefore merits in the plaintiffs' case and I allowed the application to set aside and file their defence in regard thereto. There is no appeal by the first defendants.

Also found at [1992] 3 CLJ 1740